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ABSTRACT

This document provides a discussion of the policy implications of a proposed bill introduced in the Canadian House of Commons in Spring 1977 relating to the regulation of telecommunications in Canada. This act, which can be viewed as an attempt to make telecommunications more responsive to changing technology and to provincial concerns, seeks to reemphasize federal jurisdiction over such areas as licensing, programming content, restriction of the freedom of expression, and the setting of rates and tariffs. (Author/STS)

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COMMUNICATIONS -- GETTING THE ACT TOGETHER

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COMMUNICATIONS -- GETTING THE ACT TOGETHER

It is hard to imagine any issue which affects more people in more ways than that of modern communications. And here in Canada, where communications have always been the means of binding together a diverse people, spread throughout an immense land mass, the demand for a strong national policy becomes self-evident.

Attempts to create this however, have been complicated by our dual level structure of government and the need to achieve the appropriate balance of power between the central government and the regions. In the broadcasting field in particular this has led to a number of challenges which have to be faced.

The provincial governments have a series of important concerns about educational programming, regional and local expression, and the extension of services. On the other hand, important national dimensions include the necessity of ensuring equitable service and of safeguarding the integrity of the system as a whole.

It was largely for these reasons that Spring (1977) saw the introduction in the House of Commons, of Bill C-43, An Act Respecting Telecommunications in Canada; or, as it is known in the industry, the Phase II legislation.

The new Act can be viewed as a major attempt to streamline federal regulation of telecommunications in Canada and to make it more responsive to rapidly changing technology and to provincial concerns. It can be best described as an 'umbrella' piece of legislation designed to replace four existing statutes, and parts of two other by a single body of national telecommunications law.

It has been four years in the making and results from extensive consultations between the federal government and the provinces and between government - as protector of the public interest - and the private and semi-private industries who are responsible for the transportation and utilities involved. Everyone in fact who has a large stake in current and future communications activities.

Powers and Policies as set down in the Act

Three features of the Bill are of general interest and importance. First, the Bill opens with a statement of national telecommunications policy, which clearly acknowledges the interplay between broadcasting, radiocommunication and the common carriers (i.e. the federally regulated telephone and telegraphs systems). This policy was the subject of discussion with the

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provincial governments and will serve as the basis for decisions by the CRTC, the Governor in Council (Cabinet) and the Minister of Communications.

Second, the Bill will allow the Minister of Communications, with the consent of the Governor in Council the power to authorize the sharing of certain regulatory functions - in particular those which are concerned with educational programming and cable transmission - with the provincial agencies. Third, the Bill empowers the Governor in Council to issue board policy directions to the CRTC with respect to national telecommunications policy.

In other words the new Act recognizes the right of the federal government - through its elected representatives - to play a wider role in the setting of communications policy, than hitherto it has been able to do. Under the terms of the existing Broadcasting Act, policymaking remains largely the prerogative of the CRTC.

Essentially, what the new Act seeks to do is to re-emphasize federal jurisdiction over such areas as licensing, programming content, restriction of freedom of expression and the setting of various rates and tariffs, all of which still remain the responsibilities of the CRTC, without shutting the door on those issues which have broad structural implications for the Canadian broadcasting system and more importantly, matters of national unity.

History of the provincial issues

The Bill received its First Reading in the House of Commons on March 22, 1977 and almost immediately generated a fair amount of discussion and debate among the broadcasting and communications community in Canada. To understand the nature of this debate it is helpful to look further at the background of the issues involved.

Although, history, past judicial interpretations of the British North America Act and precedent, have all given the federal government control over the development and use of communications, the provinces have increasingly claimed a share in this responsibility, arguing that the new technology better lends itself to practical, sensible application at the local and regional level.

Two factors are inherent to their demands. One is that the responsibility for education and the dissemination of culture in a local and personal sense, lies judicially within the provincial field. The responsibility for education - Section 93 of the B.N.A. Act, is in particular, a jealously guarded provincial right if only because it is traditionally the best means by which language, ideas and certain community and social values are taught and understood.

Consequently since the 1969's virtually every provincial department of education in Canada has made some effort towards the adoption of radio and television transmission for this purpose. But because of the federal government's historic position, arrangements had to be made largely on ad hoc basis and the independent broadcasting of such programs was officially unconstitutional.

The year 1970 saw the setting up of the first provincial ETV authority in Canada - Ontario's OECA - but this was done with the clear understanding that it would be a Crown corporation, not directly controlled by the provincial government, although inevitably funded by them.

The second argument put forward by the provinces rests on the enormous growth and advance made by the cable broadcasting industry in Canada. Thus while accepting federal government jurisdiction over radio-communication carried through the airwaves (determined by the Radio Reference case of 1932) the provinces say that this does not refer to transmitting/receiving undertaking located entirely within the boundaries of a single province.

Further, since cable broadcasting is totally 'local' in nature and is dependent for its transmission on the poles and conduits of public utilities, the provinces claim that this again raises question of property and civil rights which have been placed within provincial jurisdiction (BNA Act, Section 92, SS 13 & 16).

For this reason several provinces have already staked out a verbal claim to regulate and control cable, while others such as Quebec - citing the educational and cultural needs of its French-speaking population - and Saskatchewan which wanted cable licensing options for its provincially-owned telephone company, have taken the matter to the courts.

A Landmark agreement

Until the tabling of Bill C-43 the most striking indication that Ottawa was prepared to initiate new arrangements for the development of provincial communications systems, was the agreement reached in December 1976 between the federal and the Manitoba provincial government. The agreement was considered a landmark because it gives Manitoba control of the hardware that is used to bring cable television into homes.

Under the agreement, cable operators may lease from the Manitoba Telephone System the cable and other equipment to be used for the local distribution of their services. Nevertheless having gone this far, the agreement was also careful to put in writing for the first time, the federal government's responsibility for the regulation and supervision of all broadcasting and broadcast-related services, including pay-TV.

Essentially, Bill C-43 continues to do this, while its new statutory mechanism - Station 7 - allows Ottawa to delegate powers to the provinces through individual negotiation. According to the Minister of Communications, Madame Jeanne Sauvé, this will help to clarify the roles of the two levels of government. The proposed legislation recognizes the provincial government's interest in respect of cable distribution; and, at the same time, preserves the federal role as far as questions of national importance are concerned.

However, the Canadian Cable Television Association already upset by the Manitoba agreement - which essentially reverses an already established policy that some hardware would be owned by the cable companies - now feels that the development of the industry will be handicaped through more rather than less regulation. "It simply means" complained one of the Association's spokesman, "that we shall become a limited programmer at one end, and a reluctant bill-collector for the provincial government at the other".

Important Powers

Meanwhile, Chris Johnston, General Counsel to the CRTC is concerned about the potential power which the new Act would give to the Minister of Communications to negotiate away aspects of the federal government's jurisdiction which would make it difficult for the CRTC to continue to regulate the broadcasting system as a whole.

"The Commission tries in a number of ways to cope with the problem of regulation in an integrated fashion", he says, "but if you remove jurisdiction over cable television from the Commission, then quite clearly you cut off one of its arms. In other words, if it is to regulate only the over-the-air broadcasters, while knowing what is happening in cable television is having a dramatic impact on local television stations, then the Commission is not going to be very effective. The important power granted to the Minister to negotiate agreements with the provinces does provide the potential for this to happen".

However, questioned by reporters on the day that the proposed legislation was introduced, Mme Sauve argued that "this bill gives nothing away to anyone", except that it meets provincial desires for an expanded role in telecommunications because "It shows the willingness of the federal government to accomodate the provinces".

Among other concerns of the communications industry, is that outlined in Section 9 of the Bill, which provides the government with a wider role in the setting of telecommunications policy, and in fact transfers wide discretionary powers to the Cabinet in the directions which it can give to the CRTC.

Mme Sauve, when speaking to the Canadian Association of Broadcasters' 51st annual meeting in Winnipeg, last April 19, clarified some of the areas in which the Governor in Council is expected to function.

Pointing out that a non-elected regulatory body has been exercising powers that belong to the elected representatives, Mme Sauve said that when the new Act becomes law, the Cabinet can be expected to set policy on telecommunications issues with international implications, such as commercial deletion and the question of ownership of broadcasting outlets. All decisions which "have major foreign policy implications" and as such are the prerogative of the government.

The second area in which the government is expected "to attach importance" in making policy is again the area of federal-provincial relations where, "It is quite inappropriate for a regulatory agency to make policy in areas that bear on the most delicate aspect of our federation".

The CRTC's General Counsel agrees that certain broad policy issues should indeed be decided by the elected representatives, but says "The only people that are going to have a voice in it are the Cabinet members - a small minority of our elected representatives. If you accept the principle that the elected representatives should make policy, this carries it a small step forward but certainly not all the way".

He also points out that "what is not very well understood, is that just about every decision the CRTC makes - and will continue to make under the powers prescribed to it - has some policy overtones to it. Licensing and policy cannot be treated as two entirely separate things".

The question as to whether we are seeing the Act in its definitive form also at the present time remains an open one, since it will undergo Second Reading and then be referred to the standing committee on Broadcasting, Films and Assistance to the Arts for further discussion

It is at the comittee hearings, that the Members of Parliament will invite representatives from the broadcasting industry and other interested parties to make their views known. This will help them decide in what form the Bill should finally be presented.

A spokesman from the Department of Communications hopes that there will not be too much opposition, particularly as the provincial ministers of communications, "seem on balance to like it".

And he adds "You know I really think that all these arguments as to who regulates cable and who regulates this, that and the other, need not continue. If Canadians could only see it, not so much in 'we versus they' terms but as some kind of efficient, responsive sharing of the regulatory responsibility, the system would work better and everyone would be happier".

Ottawa, July 11th, 1977

Bill C-43, An Act Respecting Telecommunications in Canada, is available from Printing and Publishing, Supply and Services Canada, Ottawa, Canada K1A OS9.